Fulcrum Capital Sdn Bhd v Low Kon Yang

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO D2–22–3688 OF 1998
ABDUL AZIZ JCA
25 SEPTEMBER 2003

Civil Procedure *— Affidavits — Affidavit in reply — Time limit for filing and service — Affidavit not filed and served within 14 days from the date the affidavit replied was served on him — No prejudice caused to opposing party — Whether relevant — Rules of the High Court 1980, O 32 r 13(2)(b)*

Civil Procedure *— Affidavits — Defective affidavit — Affidavit affirmed in Malay — Whether deponent illiterate — Meaning of 'illiterate' — Whether Form 78(c) of Rules of the High Court 1980 was proper form to use — Rules of the High Court 1980, O 41 r 3*

Civil Procedure *— Affidavits — Defective affidavit — Jurat commencing on page where substantive part of affidavit ended and concluding on fresh page — Jurat beginning on completely new page — Jurat to affidavits not entitled — Whether affidavits regular*

Civil Procedure *— Summary judgment — Affidavit — Affidavit in support — Requirement to state deponent's belief that there is no defence to the claim — Statement of defence filed — Whether deponent must state, notwithstanding defence filed, that there is no defence to the action — Rules of the High Court 1980 O 14 r 2(1)*

Words and Phrases *— Illiterate — Meaning of — Affidavit affirmed in Malay — Whether deponent of affidavit was illiterate*

The plaintiffs had filed two affidavits, each in both the Malay and English versions. The ending of each version of each affidavit bore the jurat in Form 78(a) in the appendix to the Rules of the High Court 1980 ('RHC'), but the Malay version of each affidavit bore, after the jurat in Form (a), a further jurat in Form (d), which was the jurat to an affidavit by 'a person who does not understand English'. The defendant argued that the proper jurat for a person who does not understand Malay was the jurat in Form (c), which was the jurat for an 'illiterate or blind person'. Further the plaintiffs' second affidavit had 33 paragraphs. The last page of the Malay version only carried the words 'memohon supaya permohonan Plaintif dibenarkan' and thereafter the first jurat and the deponent's signature. Those words were part of a sentence which began with the word 'Saya' which appeared as the last word on the previous page. The defendant thus argued that the Malay version of the affidavit should not be admitted. The application for summary judgment was filed after a statement of defence had been filed. The affidavit in support of the application merely stated the deponent's belief that there was no defence to this action. The defendant argued that since the defence had been filed, the affidavit in support ought to have deposed that, notwithstanding the defence, the deponent believed that there was no defence, and an explanation for such belief should have been given. The affidavit in support of the plaintiffs' application was served on the defendant. The

defendant filed and served encl 9 on the plaintiffs. The defendant then served a further affidavit in encl 10 on the plaintiffs more than 14 days after the plaintiffs' affidavit was served on the defendant. The plaintiffs also served their reply to encll 9 and 10 more than 14 days after encll 9 and 10 were served on them. The defendant objected to the plaintiffs' affidavit in encl 11 as it had been served out of time. The defendant's counsel submitted, inter alia, that with the amendment of O 14 RHC by the introduction of r 2A, judicial pronouncements on the applicability of O 32 r 13(2) RHC to affidavits in summary judgment applications had been rendered academic. He submitted that the amendment, being an amendment affecting procedure, was retrospective so as to render the plaintiffs' affidavit at encl 11 inadmissible for being out of time. The registrar dismissed the defendant's preliminary objections and the defendant appealed.

Held, dismissing the appeals:

(1) An 'illiterate person', under the rules must be a person disadvantaged as a (braille-untrained) blind person, a person who is ignorant of letters, whose ignorance is aptly described by the Malay term 'buta huruf'. Letters mean nothing to him. He is as good as blind where letters are concerned. He may not even be able to sign or write his name. That is why Form (c) speaks of the person making 'his mark' to the affidavit. A 'mark' may be 'a cross etc made in place of a signature by an illiterate person'. The deponent was certainly not such a person. So Form (c) was not the form of jurat to be used in his case. The wording of Form (d) dates back to the days when an affidavit had to be in English. Now that an affidavit has to be in Malay, it would only be proper to apply it to the case of a person who does not understand Malay. The important thing is to ensure that the deponent understands what he is saying in his affidavit (see p 515B–E).

(2) The reason a jurat should immediately follow the end of a substantive or spill-over of the last substantive averment of the deposition, is in order to ensure that there is sufficient indication that the jurat relates directly to the deposition and to obviate the possibility of abuse by a party who may pre-execute the jurat of an affidavit. This court was not be prepared to hold, merely by reason of the positioning of the jurat on a fresh page, that such an affidavit was defective, certainly not in a civil case (see pp 515I–516A, C); *Voon Mow Chen v Menteri Dalam Negeri* [1993] 4 CLJ 195, distinguished.

(3) As O 14 r 2(1) RHC merely requires that the affidavit state the deponent's belief that there is no defence to the claim, there could be no justification for asking the deponent to say more than that. The deponent must be presumed to have the statement of defence in mind when he affirmed his belief that there was no defence to the claim. He must be taken to be so affirming notwithstanding the statement of defence. The plaintiffs do not bear the onus of

showing that there is no defence. The onus was on the defendant to show by affidavit that there was a triable defence (see p 518A–B).

(4) When the defendant served his reply to encl 11, the date of the hearing was still some 20 days away. It was inconceivable that the delay in the service of affidavits, if any, whether by the plaintiffs or by the defendant, had prejudiced the other party (see p 518E–F).

(5) If the correct position in law before the amendment of O 14 RHC was that O 32 r 13(2) RHC did not apply to affidavits in proceedings for summary judgment, the plaintiffs' affidavit at encl 11 was validly before the registrar and this court. The rule as to retrospectivity of an amendment as to procedure ought not to operate so as to now render invalid what, before the amendment, was once valid. Even if the true position in law was that before the amendment the plaintiffs' affidavit at encl 11 was out of time, then the court could resort to O 2 r 3 RHC, which was a procedural provision and has retrospective effect. It does not change the law as to the matter of non-compliance, the non-compliance remaining a non-compliance. What it does is to say, in effect, that the court should not allow the non-compliance to be visited with any consequence if it has not occasioned a substantial miscarriage of justice (see p 521A–E).

[Bahasa Malaysia summary

Plaintif-plaintif telah memfailkan dua afidavit, masing-masing dalam bahasa Melayu dan Bahasa Inggeris. Penghujung setiap versi afidavit membawa jurat dalam Borang 78(a) dalam lampiran kepada Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), tetapi versi Bahasa Melayu setiap afidavit tersebut mengandungi, selepas jurat dalam borang (a), jurat seterusnya dalam borang (d), iaitu jurat kepada afidavit oleh 'a person who does not understand English'. Defendan mendakwa bahawa jurat yang betul bagi seseorang yang tidak memahami Bahasa Melayu adalah jurat dalam borang (c), iaitu jurat bagi 'illiterate or blind person'. Seterusnya afidavit kedua plaintif mengandungi 33 perenggan. Muka surat terakhir versi Bahasa Melayu hanya menagdungi perkataan 'memohon supaya permohonan Plaintif dibenarkan' dan seterusnya jurat pertama dan tandatangan deponen. Perkataan-perkataan ini merupakan sebahagian daripada ayat yang bermula dengan perkataan 'Saya' yang ternyata sebagai perkataan terakhir pada muka surat sebelumnya. Maka defendan mendakwa versi Bahasa Melayu afidavit tersebut tidak harus diterima. Permohonan bagi penghakiman terus telah difailkan selepas suatu pernyataan pembelaan difailkan. Afidavit sokongan permohonan tersebut setakat menyatakan kepercayaan deponen bahawa tiada pembelaan kepada tindakan ini. Defendan mendakwa, memandangkan yang pembelaan telah difailkan, afidavit sokongan tersebut harus mendeposkan bahawa, walaupun pembelaan telah difailkan, malah deponen percaya tiada sebarang pembelaan, dan

penjelasan bagi kepercayaan tersebut harus diberikan. Afidavit sokongan permohonan plaintif telah disampaikan ke atas defendan. Defendan telah memfailkan dan menyerahkan lampiran 9 ke atas plaintif. Defendan kemudiannya menyampaikan afidavit lanjutan dalam lampiran 10 ke atas plaintif lebih 14 hari selepas afidavit plaintif disampaikan ke atas defendan. Plaintif-plaintif juga telah menyampaikan jawapan mereka kepada lampiran 9 dan 10 lebih 14 hari selepas lampiran 9 dan 10 disampaikan ke atas mereka. Defendan membantah kepada afidavit plaintif dalam lampiran 11 memandangkan ia lewat disampaikan. Peguam defendan berhujah, antara lain, bahawa dangan pindaan kepada A 14 KMT dengan kemasukan k 2A, pendapat kehakiman mengenai kesesuaian A 32 k 13(2) KMT kepada afidavit dalam permohonan bagi penghakiman terus adalah sekadar akademik sahaja. Beliau berhujah bahawa pindaan yang dibuat, sebagai suatu pindaan prosedur, berkuatkuasa secara retrospektif dan menjadikan afidavit plaintif dalam lampiran 11 tidak boleh diterima kerana difailkan lewat. Pendaftar telah menolak bantahan awal defendan dan defendan telah merayu.

Diputuskan, menolak rayuan tersebut:

(1) Seseorang yang 'illiterate', di bawah keadah tersebut semestinya seseorang yang mengalami kecacatan sebagai seseorang buta yang tidak mengetahui braille, seseorang yang tidak kenali abjad, yang kejahilannya disebut dalam Bahasa Melayu sebagai 'buta huruf'. Abjad tidak membawa sebarang maksud baginya. Beliau seakan-akan buta sekadar abjad. Beliau mungkin tidak dapat menandatangani atau menulis namanya. Itulah sebabnya Borang (c) memperuntukkan seseorang itu menurunkan 'his mark' pada afidavit tersebut. 'Mark' tersebut mungkin 'a cross etc made in place of a signature by an illiterate paerson'. Deponen semestinya bukan orang sebegitu. Jadi Borang (c) bukannya borang jurat yang patut digunakan di dalam kesnya. Pernyataan Borang (d) bersejarah ke masa sesuatu afidavit perlu dideposkan dalam Bahasa Inggeris. Memandangkan yang setiap afidavit sekarang perlu dideposkan dalam Bahasa Melayu, adalah wajar ia dipakai kepada seseorang yang tidak faham Bahasa Melayu. Yang penting adalah mengesahkan bahawa deponen faham apa yang beliau deposkan dalam afidavitnya itu (lihat ms 515B–E).

(2) Sesuatu jurat harus mengikut penghujung suatu pernyataan substantif atau 'spill-over' daripada pernyataan substantif terakhir sesuatu affidavit, sebagai tanda jurat tersebut merujuk kepada afidavit itu dan menghindari dari kemungkinan penyalahgunaan mana-mana pihak yang mungkin menandatangani jurat afidavit tersebut terlebih dahulu. Mahkamah ini tidak bersedia memutuskan, semata-mata kerana kedudukan jurat pada muka surat baru, bahawa afidavit sebegitu cacat, lebih-lebih lagi dalam suatu kes sivil (lihat ms 515I–516A, C); *Voon Mow Chen v Menteri Dalam Negeri* [1993] 4 CLJ 195, dibezakan.

(3) Memandangkan yang A 14 k 2(1) KMT semata-mata memerlukan sesuatu afidavit menyatakan kepercayaan deponen bahawa tiada sebarang pembelaan kepada tuntutannya, maka tiada justifikasi meminta deponen mengatakan lebih daripada itu. Deponen dianggap telah merujuk kepada pernyataan pembelaan apabila beliau mengesahkan kepercayaannya bahawa tiada sebarang pembelaan kepada tuntutannya. Beliau dianggap berbuat demikian walaupun suatu pernyataan pembelaan telah difailkan. Plaintif tidak memikul beban menunjukkan ketiadaan pembelaan. Beban dipikul defendan bagi menunjukkan melalui afidavit kewujudan pembelaan yang perlu dibicarakan (lihat ms 518A–B).

(4) Apabila defendan menyampaikan jawapannya kepada lampiran 11, tarikh perbicaraan masih lebih kurang 20 hari lagi. Tidak mungkin sebarang kelewatan penyampaian afidavit, jika ada, walau oleh plaintif mahupun oleh defendan telah memprejudiskan mana-mana pihak (lihat ms 518E–F).

(5) Sekiranya kedudukan undang-undang sebelum pindaan kepada A 14 KMT aadlah bahawa A 32 k 13(2) KMT tidak boleh dipakai bagi afidavit dalam prosiding bagi penghakiman terus, maka afidavit plaintif pada lampiran 11 sah dihadapan pendaftar dan mahkamah ini. Peraturan tinjau kembali sesuatu pindaan prosedur tidak harus menjadikan tidak sah sesuatu yang, sebelum pindaan itu, memang sah. Jikapun, mengikut kedudukan undang-undang sebelum pindaan itu, afidavit plaintif pada lampiran 11 di luar masa, maka mahkamah dapat bergantung kepada A 2 k 3 KMT, sesuatu peruntukan prosedur yang membawa kesan tinjau kembali. Ia tidak menukar kedudukan undang-undang pada hal ketidakpatuhan, ketidakpatuhan sememangnya ketidakpatuhan. Apa yang diperuntukkan adalah bahawa mahkamah tidak harus membenarkan ketidakpatuhan dikenakan sebarang akibat melainkan ketidakpatuhan itu telah menyebabkan suatu kegagalan keadilan (lihat ms 521A–E).]

Notes

For cases on defective affidavits, see 2 *Mallal's Disgest* (4th Ed, 2001 Reissue), paras 341-354.

For cases on affidavits in reply, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 280-288.

For cases on affidavits in summary judgment, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 5688-5716.

Cases referred to

Krishnamurthy & Anor v Malayan Finance Corporation Bhd [1986] 2 MLJ 134 (refd)

Lee Wah Bank Ltd v Chee Kong Electrical Engineering Sdn Bhd & Ors [1999] 6 MLJ 153 (refd) A

McLardy v Slateum (1890) 24 QBD 504 (refd)

PB Securities Sdn Bhd v Abdul Rashid bin Mohamed [1994] 3 MLJ 168 (refd)

Pelasari Sdn Bhd v Reebok Sdn Bhd Guaman Sivil No S3-22-303-1994 (refd) B

Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85 (refd)

Structural Concrete Sdn Bhd & 3 Ors v Wing Tiek Holdings Berhad [1997] 1 AMR 589, [1997] 1 MLJ 581 (refd) C

Voon Mow Chen v Menteri Dalam Negeri & Anor and five other cases [1993] 4 CLJ 195 (dist)

Wing Tiek Holdings Bhd v Yong Chee Thiam & Anor [1994] 3 MLJ 379 (refd)

Yap Piew Chuan v Araca Enterprise Sdn Bhd [1998] 1 AMR 645 (refd) D

Legislation referred to

Contracts Act 1950 s 57(1)

Rules of the High Court 1980 O 2 r 3, O 14 r 2(1), 2A, O 32 r 13(2), (b), O 41 r 3, Form 18, forms (a), (c), (d) in Form 78, Appendix A E

Securities Industry Act 1983 ss 7, 11A, (6)

Ahmad Moosdeen (*Chan, Moosdeen & Partners*) for the plaintiffs.

Chan Siew Cheong (*Arham Rahimy bin Hariri* with him) (*Kumar Jaspal Quah & Aishah*) for the defendant. F

Abdul Aziz JCA: There are before me two appeals by the defendant which have been heard together. One, encl 17, is an appeal against the decision of the learned senior assistant registrar dismissing the defendant's preliminary objections in respect of the plaintiff company's application for summary judgment. The other, encl 24, is an appeal against the decision of the senior assistant registrar allowing the plaintiffs' application for summary judgment. The appeal as regards the preliminary objections was filed following the decision on them and before the application for summary judgment was allowed. That is the reason why there are two appeals. The plaintiffs have decided not to object to the defendant's appealing separately in respect of his preliminary objections. G H

I shall first deal with the preliminary objections.

The preliminary objections: The jurat I

For the purposes of their summary judgment application, the plaintiffs filed two affidavits, each in both the Malay and English versions. The ending of

each version of each affidavit bears the jurat in form (a) in Form 78 in Appendix A to the Rules of the High Court 1980 ('RHC'), but the Malay version of each affidavit bears after the jurat in form (a) another jurat in form (d), which there in the RHC is said to be the jurat to an affidavit by 'a person who does not understand English'. For that reason, the defendant's counsel submitted that the jurat in form (d) is an improper jurat for an affidavit in Malay and that the proper jurat for a person who does not understand Malay is the jurat in form (c), which is the jurat for an 'illiterate or blind person' that satisfies the requirements of O 41 r 3. I do not think the defendant is an illiterate person. By 'illiterate person', O 41 r 3 must be thinking of a person as disadvantaged as a (braille-untrained) blind person, that is a person who is ignorant of letters, whose ignorance is aptly described by the Malay term 'buta huruf'. Letters mean nothing to him. He is as good as blind where letters are concerned. He may not even be able to sign or write his name. That is probably why form (c) speaks of the person making 'his mark' to the affidavit. The *Concise Oxford Dictionary* says that 'mark' is 'a cross etc. made in place of a signature by an illiterate person'. The defendant is certainly not such a person. So form (c) is not the form of jurat to be used in his case.

Form (d) was originally meant for the days when an affidavit had to be in English. Now that an affidavit has to be in Malay, it is proper to apply it in the case of a person who does not understand Malay. The important thing is to ensure that the deponent understands what he is saying in his affidavit.

I think the jurats in the Malay affidavits are alright.

Whether affidavit pre-executed

The plaintiffs' second affidavit has 33 paragraphs. The last page of the English version carries paras 31 to 33 and, after para 33, the jurat and the deponent's signature. The last page of the Malay version, however, only carries the words 'memohon supaya permohonan Plaintif dibenarkan' and thereafter the first jurat and the deponent's signature. Those words are part of a sentence which begins with the word 'Saya' which appears as the last word on the previous page.

Relying on *Voon Mow Chen v Menteri Dalam Negeri & Anor and five other cases* [1993] 4 CLJ 195, the defendant's counsel submitted that the Malay version of the affidavit should not be admitted. I quote holding (2) at p 196:

> An affidavit where the jurat begins and ends on a fresh page and does not immediately follow the end of a substantive or spill-over of the last substantive averment of the deposition is also defective for lack of indication that the jurat relates directly to the deposition. Such affidavits are inadmissible without leave of court, to be exercised at the discretion of the court under O 41 r 4 RHC 1980 [Rules of the High Court 1980].

In *Voon Mow Chen,* which was a habeas corpus criminal application, Vincent Ng JC (as he then was) explained at p 198 that the reason why a

jurat 'should immediately follow the end of a substantive or spill-over of the last substantive averment of the deposition, is in order to ensure that there is sufficient indication that the jurat relates directly to the deposition. This is also in order to obviate the possibility of abuse by any party who may pre-execute jurats of affidavits in the absence of any averments for attachment to subsequently prepared averments'. The learned JC, however, took pains at p 199 to dispel any impression that the affidavit in that case had in fact been pre-executed. In actual fact, therefore, the affidavit was not defective but it was held to be defective because the position of the jurat was such that in some other affidavit the jurat might have been completed without reference to the deposition.

I would not be prepared to hold, just by reason of the positioning of the jurat on a fresh page, that an affidavit is defective as not covered by the jurat, certainly not in a civil case. I would assume that the commissioner for oaths before whom the affidavit in this case was affirmed would not have completed and signed the jurat unless he was satisfied that there was an affidavit that the deponent had sworn before him and I would assume that what left him was what was filed in court, that is to say, that there had been no switching along the way, unless there are other circumstances or indications that call into question the integrity of the affidavit. There are no such circumstances. On the contrary, there is the fact that the English version of the affidavit was not pre-executed, so that there could be no reason why the Malay version would have been. And there is the fact that the last page has, before the jurat, some 'spillover' from the previous page.

Verification of plaintiffs' claim

By O 14 r 2(1), the affidavit in support of a summary judgment application must be an affidavit in Form 18 verifying 'the facts on which the claim ... to which the application relates is based ...'. The Form 18 affidavit is a very simple and brief affidavit that does not envisage that the facts on which the claim is based are deposed to in it. Those facts are deposed to by reference to the writ of summons and such deposition is done by this statement of reference in para 1 of Form 18: 'The particulars of the said claim appear by the indorsement on the writ of summons in this action'.

The indorsement on the writ of summons in this case does not set out the particulars of the claim but refers to the statement of claim. It says: 'Tuntutan plaintif terhadap defendan adalah seperti yang terkandung dalam pernyataan tuntutan yang dilampirkan'. The statement of claim was amended two or three months after it was filed together with the writ. Six days after the statement of claim was amended the plaintiffs filed their summary judgment application. Paragraph 1 of the supporting affidavit conforms to para 1 of Form 18 and includes the statement of reference that I have quoted. The affidavit goes even further to actually set out the facts on which the application was based.

The defendant's objection arose from the fact that while in the English version of the affidavit the statement of reference makes reference to the writ of summons as amended, in the Malay version the statement of

reference refers to the writ of summons without saying 'sebagaimana dipinda'. Since the Malay version is the operative version, the defendant's counsel argued that the supporting affidavit, by failing to refer to the writ as amended, failed to verify, as required by O 14 r 2(1), the facts on which the claim to which the application related was based, and that, therefore, summary judgment ought not to have been granted.

I think this is a frivolous objection. Since it arose from the mere fact that the Malay version of the affidavit, unlike the English version, does not, in mentioning the writ in the statement of reference in para 1, mention it as amended, I shall dispose of it simply by saying that in view of the fact that the statement of reference in the English version of the affidavit mentions the writ as amended and the fact that when the application for summary judgment was made the statement of claim had been amended, the deponent of the affidavit must, in para 1 of the Malay version of the affidavit, when referring to the indorsement on the writ, have intended to refer to the indorsement as it in turn refers to the statement of claim, not in its original state, but as amended. In other words, I regard the words 'sebagaimana dipinda' as having been inadvertently, not intentionally, left out, and I would read the affidavit as if those words were there, which if they were, there would have been no occasion to raise this objection.

Delay in filing application

The writ and statement of claim were filed on 6 October 1998. The defendant entered appearance on 19 November 1998. The statement of defence was filed and served on 17 December 1998. The amended statement of claim was filed on 24 December 1998. On 30 December 1998, the plaintiffs filed their application for summary judgment, which was two weeks after the statement of defence was served on the plaintiffs. Because there was no explanation for the two weeks' delay, the defendant's counsel, relying on *Krishnamurthy & Anor v Malayan Finance Corporation Bhd* [1986] 2 MLJ 134, submitted that summary judgment ought not to have been granted.

I have already decided in *Lee Wah Bank Ltd v Chee Kong Electrical Engineering Sdn Bhd & Ors* [1999] 6 MLJ 153 that unexplained delay is no bar to summary judgment and I adhere to that decision.

Failure to refer to the statement of defence

The application for summary judgment was filed after the statement of defence had been filed. As required by O 14 r 2(1), para 15 of the affidavit in. support of the application stated the deponent's belief 'that there is no defence to this action'.

Relying on *McLardy v Slateum* (1890) 24 QBD 504, learned counsel for the defendant submitted that since the defence had been filed, the affidavit in support of the application should depose that, notwithstanding the defence, the deponent believes that there is no defence, and the explanation for such belief should be given.

In my opinion, since O 14 r 2(1) requires the affidavit to state only that in the deponent's belief there is no defence to the claim, there is no justification for asking the deponent to say more than that. The deponent must be presumed to have the statement of defence in mind when he affirmed that in his belief there was no defence to the claim. He must be taken to be so affirming notwithstanding the statement of defence. As to explaining why he believes there is no defence notwithstanding the statement of defence, I do not think that the plaintiffs ought to bear the onus of showing that there is no defence. The onus is on the defendant to show by affidavit that there is a triable defence.

Delay in filing affidavit

The plaintiffs' application for summary judgment was fixed for hearing before the senior assistant registrar on 20 April 1999. The affidavit in support of the application was served on the defendant on 30 December 1998. The defendant's first affidavit in reply dated 11 January 1999 (encl 9) was served on the plaintiffs on 12 January 1999. The defendant served a second affidavit on the plaintiffs (encl 10) on 11 February 1999. It was an affidavit in furtherance of, and to reinforce an averment in, encl 9, which was an affidavit in reply to the plaintiffs' affidavit in support of their application. Therefore encl 10 was also in reply to the plaintiffs' affidavit. Since it was served on the plaintiffs more than 14 days after the plaintiffs' affidavit was served on the defendant, encl 10 was served out of time contrary to O 32 r 13(2)(b). The plaintiffs served their reply to encll 9 and 10 on 18 March 1999, more than 14 days after encll 9 and 10 were served on them. So the plaintiffs' affidavit, which was encl 11, was also served out of time contrary to O 32 r 13(2)(b). The defendant served their reply to encl 11, which was encl 12, on 31 March 1999. There was no further affidavit after that and the date of hearing, 20 April 1999, was still 20 days away. Therefore it is inconceivable that any delay in the service of affidavits, whether by the plaintiffs or by the defendant, had prejudiced either party. The defendant's objection was to the plaintiffs' affidavit at encl 11. He sought to disqualify it on the ground of delay in contravention of O 32 r 13(2)(b).

In his initial submission on the point, which was made on 18 January 2000, the defendant's counsel relied for support of the defendant's objection on the Court of Appeal decision in *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85. It was an application to set aside the writ and statement of claim and the question in the appeal was whether the period of 14 days prescribed in O 32 r 13(2)(b) within which an affidavit in reply must be filed and served was to be reckoned from the date when the affidavit to be replied to was served with an unsealed copy of the application or from the date when the same affidavit was subsequently served with the sealed copy of the application. The Court of Appeal ruled in favour of the respondent for the latter date. That disposed of the appeal. The Court of Appeal, however, at the inivitation of the appellants' counsel, went further to rule that O 32 r 13(2)(b) applied to proceedings for summary judgment and that the court had no discretion to admit an affidavit that is filed and served beyond the 14 days prescribed by the rule.

A In *Yap Piew Chuan v Araca Enterprise Sdn Bhd* [1998] 1 AMR 645, I had this to say at p 654:

> As regards the affidavits, there are two conflicting pronouncements by the Court of Appeal on the question. In *Perbadanan Nasional Insurance Sdn Bhd v Pua Lai Ong* [1996] 3 AMR 2869, the Court of Appeal, after considering a
B number of High Court decisions, confirmed the decision in *Wing Tiek Holdings Bhd v Yong Chee Thiam & Anor* [1994] 3 MLJ 379 that O 32 r 13(2)(b) applies to the affidavit in reply in a summary judgment application. In *Structural Concrete Sdn Bhd & 3 Ors v Wing Tiek Holdings Berhad* [1997] 1 AMR 589, the Court of Appeal adopted the observation of the learned judge in *PB Securities Sdn Bhd v Abdul Rashid bin Mohamed* [1994] 2 AMR 1694 to the
C effect that O 32 r 13(2) does not apply to the procedure for summary judgment. In view of the conflicting decisions, I shall adhere to my decision in *Pelasari Sdn Bhd v Reebok Sdn Bhd & Anor* in Guaman Sivil No S3-22-303-1994 (unreported), which I delivered on July 18, 1995, in which, after considering the conflicting High Court decisions in the *Wing Tiek Holdings* and
D the *PB Securities* cases, and giving my own reasons, I decided that O 32 r 13(2)(b), does not apply to affidavits in reply in O 14 proceedings. It follows, therefore, that, in my judgment, the defendants' affidavits are not disqualified and should be considered.

I would like to add the following observations. Although reported later, the
E decision in *Structural Concrete Sdn Bhd & 3 Ors v Wing Tiek Holdings Berhad* [1997] 1 AMR 589 (see also [1997] 1 MLJ 581) was delivered earlier than that in *Perbadanan Naswnal Insurans.* The former was delivered on 15 May 1996 and the latter on 11 July 1996.

In *Structural Concrete,* the question whether O 32 r 13(2) applies to summary judgment proceedings was not an issue. The observations in *PB*
F *Securities Sdn Bhd v Abdul Rashid bin Mohamed* [1994] 3 MLJ 168 that the Court of Appeal adopted, which were those of Richard Tallala J, were as follows at p 174:

> As I understand it r 13 originally stood as it now does in sub-r 1 thereof. Rule 13(2) which was introduced by amendment which came into effect on 1
G August 1993 was effected to bring order to disorder created in the hearing of applications in chambers by parties filing affidavits at the eleventh hour thus causing surprise and necessitating time for consideration of the same and reply by affidavit resulting in the application in question having to be adjourned repeatedly and so causing delay, wastage of judicial time and costs. I do not reckon that the Rule Committee in introducing r 13(2) intended that
H its provisions should apply to the well-entrenched and I would say more stringent procedure applicable to O 14.

The observations were about the object of O 32 r 13(2) but were made for the purpose of concluding that it was not intended to apply to summary judgment proceedings. The Court of Appeal, for the purposes of the appeal
I before them, might have been concerned only with the object of O 32 r 13(2), which is stated in the second sentence of the passage. But they adopted the third sentence as well, which states the conclusion as to the

application of r 13(2) to summary judgment proceedings. I must assume that that was intentional and done after due consideration, although I do not expect that there would have been any argument on the question, and although the Court of Appeal did not appear to consider the contrary decision of Shaik Daud J (as he then was) in *Wing Tiek Holdings Bhd v Yong Chee Thiam & Anor* [1994] 3 MLJ 379. The learned judge was on the panel in the Court of Appeal. It is interesting to reflect whether Shaik Daud JCA, by being of one mind with the other members of the panel in adopting the observations of Richard Talalla J, disagreed with his own decision in *Wing Tiek Holdings*.

In *Perbadanan Nasionai Insurans*, the question about the applicability of O 32 r 13(2) to summary judgment proceedings was also not an issue that was material to the disposal of the appeal. The Court of Appeal ruled on that question only on the invitation of learned counsel for the appellants and they did so after considering the conflicting decisions of the High Court, including those of Richard Talalla J and Shaik Daud J, on the question. Because the question was not crucial to the appeal, I do wonder whether it was fully argued.

In view of the circumstances of the two Court of Appeal decisions, I am not convinced that I am bound to follow *Perbadanan Nasional Insurans* and to ignore *Structural Concrete*, I still think there is a conflict of opinion, and I will still adhere to my decision in *Pelasari Sdn Bhd v Reebok Sdn Bhd Guaman Sivil No S3-22-303-1994*.

The plaintiffs' counsel, however, in his reply on the point, which he made on 18 January 2001, did not seek to argue that O 32 r 13(2)(b) did not apply to the plaintiffs' affidavit at encl 11. Maybe that was because by that time O 14 had been amended by the introduction of r 2A, which provides that O 32 r 13(2) shall apply to all affidavits in respect of an application for summary judgment, and the plaintiffs' counsel thought that the amendment (PU(A) 342 of 2000), which took effect on 22 Septemer 2000, applied retrospectively so as to render the plaintiffs' affidavit at encl 11 subject to O 32 r 13(2). Essentially, the argument of the plaintiffs' counsel was simply that since the defendant too had been late in filing and serving his affidavit at encl 10, there could be no injustice in the plaintiffs' filing and serving their affidavit at encl 11 out of time. It was argued that the defendant, having breached O 32 r 13(2)(b) without demur by the plaintiffs, ought not to object when subsequently the plaintiffs came to be in breach.

In his reply on 19 October 2001, the defendant's counsel submitted, inter alia, that with the amendment of O 14 by the introduction of r 2A, judicial pronouncements on the applicability of O 32 r 13(2) to affidavits in summary judgment applications had been rendered academic. He submitted that the amendment, being an amendment, affecting procedure, was retrospective so as to render the plaintiffs' affidavit at encl 11 subject to O 32 r 13(2)(b) and, by application of the decision of the Court of Appeal in *Perbadanan Nasional Insurans*, inadmissible for being out of time.

A If the correct position in law before the amendment of O 14 was, as I still think it was, that O 32 r 13(2) did not apply to affidavits in proceedings for summary judgment, the plaintiffs' affidavit at encl 11 was validly before the senior assistant registrar when he granted summary judgment in this case and before me when I commenced hearing these appeals. I do not think that the rule as to retrospectivity of an amendment as to procedure ought to B operate so as to now render invalid what, before the amendment, was once valid. If, however, the true position in law is that even before the amendment the plaintiffs' affidavit at encl 11 was subject to O 32 r 13(2)(b), then I would resort to r 3 of O 2, which was introduced by PU(A) 197 of 2002 and which came into force on 16 May 2002, after the close of C submissions in these appeals. It provides as follows:

> A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

D It is a procedural provision and, to my mind, it has retrospective effect in that it applies whenever a court, whether at first instance or on appeal, has, as I now have, to decide a point of preliminary objection as to a non-compliance with the rules, even though the non-compliance occurred, as in this case, before the provision came into force. It does not change the law as to the matter of non-compliance, the non-compliance remaining a non-E compliance. What it does is to say, in effect, that the court should not allow the non-compliance to be visited with any consequence if it has not occasioned a substantial miscarriage of justice. As I have shown, in this case the delay by the plaintiffs in filing and serving their affidavit at encl 11 could not have occasioned any miscarriage of justice to the defendant because the F defendant was able to file and serve their reply affidavit at encl 12 when the date of hearing was still 20 days away.

I, therefore, dismiss with costs the defendant's appeal as to his preliminary objections. I turn now to his appeal against the grant of summary judgment.

G *The summary judgment*

The put option agreement and the plaintiffs' claim

The summary judgment that the plaintiffs sought was judgment on their claim under a put option agreement dated 4 October 1996 ('the H agreement') between, on the one hand, the defendant, and two others as the grantors and, on the other hand, Octofocus Corporation Sdn Bhd as the grantee. The agreement concerned 3,899,999 ordinary shares in MCL Corporation Bhd, referred to therein as 'the option shares'. The shares had been or were subsequently deposited by Octofocus with the plaintiffs as part of the security for a loan given to Octofocus by the plaintiffs for purchasing I the shares. By cl 2 of the agreement, the grantors granted to the grantee 'multiple put options whereby the grantor may be required by the grantee to purchase the option shares or any part thereof at the strike price in

accordance with the terms hereof'. As to the time when the grantee may require the grantors to purchase the shares, this was dealt with by cl 4, which provided as follows:

> The parties hereby agree that upon the occurrence of any one of the following events or at any time during the period of one (1) year and thirty (30) days from the expiry of the Tenor or thirty (30) days from the expiry of the Extended Tenor, whichever shall be the applicable, the Grantee shall be entitled to exercise the options hereby granted by demanding the Grantor to purchase and upon such demand the Grantor shall purchase the Option Shares or such part thereof as stated in the demand at the Strike Price.

There were two limbs under either of which the grantee was entitled, to exercise the options. Under the .first limb the grantee was entitled to exercise the option upon the happening of any of the events listed in cl 4 which events I have not quoted because the exercise of the options in this case was not under the first limb. Under the second limb the grantee was entitled to exercise the options within the period specified in that limb. The exercise of the options under that limb was not dependent on the occurrence of any event. The term 'Tenor' in that limb was defined in cl 1 as the period of one year from 8 October 1996, expiring on 8 October 1997. The term 'Extended Tenor' in that limb was defined in cl 1 as the period of one year from the expiry of the Tenor, that is the period from 8 October 1997 and expiring on 8 October 1998. According to the second limb, therefore, the grantee was entitled to exercise the option at any time within one year and thirty days from 8 October 1997 (the expiry of the Tenor) or within thirty days from 8 October 1998 (the expiry of the Extended Tenor).

According to cl 5, upon a demand made by the grantee, the grantors were bound to purchase the option shares and pay to the grantee the strike price for the shares. If the demand was made under the second limb of cl 4 that I have mentioned, according to cl 5(2) the payment of the strike price had to be made 'on or before the expiry of five (5) business days from the date of the demand'.

On 19 February 1997 Octofocus assigned their rights under the agreement to the plaintiffs, so that the plaintiffs stepped into the shoes of Octofocus as the grantee under the agreement.

On 20 January 1998 the plaintiffs gave to the three grantors notice under cl 4 of the agreement to purchase the option shares at the strike price of RM42,431,989.12, and to pay it within the time stated in cl 5(2), that is, by 27 January 1998. The grantors failed to purchase. The plaintiffs, therefore, pursuant to cl 10(b), disposed of the shares for RM16,797,228.02 and claimed from the defendant, one of the three grantors, the shortfall of RM25,634,761.10. The summary judgment that the plaintiffs sought was for that amount and for interest and costs.

The time for paying the strike price

The demand, being made on 20 January 1998, was made in accordance with the second limb of cl 4, within one year and 30 days of 8 October 1997,

the date of the expiry of the Tenor. According to cl 5(2), the strike price had, as I have stated, to be paid on or before the expiry of five business days from 20 January 1998, the date of the demand, which was a Tuesday. Clause 1 of the agreement defined 'business day' as 'A day (excluding Saturdays) on which banks are open for business in Kuala Lumpur and on which transactions in the Kuala Lumpur interbank money market are carried out'. So a Saturday and a Sunday would not be a business day. 21 January would be one business day from 20 January, and therefore, were it not for the exclusion of the two days, 25 January would be five business days from 20 January, but, with the exclusion of the two days, 27 January would be five business days from 20 January, and the expiry of the five business days would take place with the expiry of 27 January. So the plaintiffs were correct in demanding that payment of the strike price be made, as stated in their notice ol 20 January 1996, 'by 27 January 1998', that is, at the latest on 27 January 1998, 'by' meaning 'not later than'.

The strike price formula

The strike price, which the plaintiffs specified as RM42,431,989.12, was to be determined according to the formula in cl 1 of the agreement. The formula was '[N x (RM9.00 + [RM9.00 x 16% x D/365])] – E'. D stood for 'the number of days elapsed from 8 October 1996 to the date of payment of the Strike Price' and N stood for the number of the option shares, which was 3,899,999. E stood for the extension fee in respect of the Extended Tenor and is not relevant in this case because there was no Extended Tenor, so that the formula in the circumstances of this case would be just 'N x (RM9.00 + [RM9.00 x 16% x D/365])'.

The alleged uncertainties in variable D

It was submitted on behalf of the defendant, as a point against summary judgment, that the agreement was void for uncertainty. The uncertainty was said to exist in the definition of the variable D in the formula, namely, 'the number of days elapsed from 8 October 1996 to the date of payment of the Strike Price'. It was argued, firstly, that since at the time that the strike price was demanded, that is 20 January 1998, it could not be known when would be the date of actual payment of the strike price, there was uncertainty as to that date, rendering the definition of variable D unworkable for the determination of the strike price according to the formula. Secondly, it was argued that there was uncertainty whether, in the definition of variable D, the number of elapsing days would or would not include 8 October 1996.

As to the first argument, I think the problem raised is not a real or a genuine one, but is raised as a lame excuse for not paying. There is nothing in cll 4 or 5 that requires the demand of the grantee to specify the amount of the strike price. The formula for it is provided. The grantee and the grantors were equally able to work it out to determine the amount of the strike price to be paid. By reason of the variable D, the amount of the strike price would vary according to the date when it was paid. If the grantors genuinely wanted to fulfil their obligations under the agreement by

complying with the grantee's demand, and they had set for themselves the particular date on which they would pay the strike price, they could, using the formula, and taking that date for the purposes of variable D, determine the amount of strike price that they had to pay and accordingly pay it on that date. Of course it would be convenient in practice for the grantee to work out the strike price and state it in the notice of demand. But they could do so only by assuming that the grantors would pay the strike price on a particular day and in this case the plaintiffs assumed that the defendant would pay it on the last day, 27 January 1998. If they had foreseen that this point would arise, they could easily have specified in the notice, in respect of each earlier day, the amount of strike price to be paid if it was paid on that day. But that would have been altogether unnecessary because, as I have said, if the defendant did want to pay, and to pay on some earlier day, he could have worked out the strike price and paid it on that day. This is not at all a problem of uncertainty in the agreement.

Neither is the second argument a problem of uncertainty in the agreement. It only requires the exercise of common sense to determine whether 'the number of days elapsed from 8 October 1996 to the date of payment of the Strike Price' includes or excludes 8 October 1996. If the end or last day was 9 October, it cannot be that no day has elapsed from 8 October to 9 October. Neither can it be that two days have elapsed from 8 October to 9 October, because to say that would be to render impossible the situation of one day elapsing from 8 October. It can only be that one day has elapsed from 8 October to 9 October, or two days to 10 October, or three days to 11 October. In other words, in counting the number of days, you exclude 8 October but include the end or last day.

The value of variable P

In relation to the formula, the defendant raised another point which, although in his written submission brought under Pt C entitled 'The Validity of the Put Option Agreement', is actually, as expressly stated in para 3.2, a point that questions the validity of the demand notice and not the validity of the agreement. This point is in fact raised again in Pt D, where the defendant questions the validity of the demand notice. The point is that, in arriving at the strike price of RM42,431,989.12 by using the formula, the plaintiffs must have arrived at the value of 476.5277775 for the variable D in the formula, which could not be correct because D represented a number of days and could not include a fraction. I have personally checked the calculation from the formula and find that it is indeed by giving D the value of 476.5277775 that one would arrive at the strike price of RM42,431,989.12.

The plaintiffs' explanation is that, in arriving at the strike price of RM42,431,989.12, they gave the value of 477 to the variable D, that is to say, they took 'the number of days from 8 October 1996 to the date of payment of the strike price', that is 27 January 1998, to be 477 days. But if D was 477 days, by my calculation according to the formula, the strike price should be RM 42,439,254.76, not RM42,431.989.12.

As I said before, the right way to arrive at the number of days represented by D is to exclude 8 October 1996 but to include the end or last day, 27 January 1998. Doing that, I arrive at 476 days for D, not 477. Giving D 476 days, using the formula I arrive at the strike price of RM42,423,865.54, which is lower than the sum of RM42,431,989.12 demanded in the plaintiffs' notice, a difference of RM8,123.58. In his written submission the defendant questioned the notice on the basis that he did not know what figure the plaintiffs had used for D or what method they had used in arriving at the strike price and that the plaintiffs ought not to use a formula not provided in the agreement in arriving at the strike price. But whatever may have been the means by which the plaintiffs arrived at the sum of RM42,431,989.12, of real relevance I think is the consequence that the plaintiffs had demanded as the strike price a sum which was RM8,123.58 more than what the amount would have been had the formula been correctly applied.

The question is whether there is a triable issue that for that reason the notice was not valid. I do not think there is. As I said before, it was not required by the agreement that the notice specify the amount of the strike price and that is because the defendant was equally competent to determine the strike price that he had to pay. It was merely a matter of correctly applying the formula and arriving at the right figure. A mistake in a figure that need not be specified in the notice is just a mistake and does not invalidate the notice. It was up to the defendant, if he wanted to honour the agreement, to pay the amount that was the correct amount by his calculation. The plaintiffs would have had no choice but to accept the payment, reserving to themselves the right to sue for the difference if they maintained that their figure was right. The problem then would have been simply a bona fide dispute of calculation about the difference, which could easily have been resolved, and not a problem of breach of the agreement. As I find on the plaintiffs' present claim that their figure is not correct, the proper thing to do would be to reduce the shortfall of RM25,634,761.10 claimed by the plaintiffs by the difference of RM8,123.58, to become RM25,626,637.52.

Whether the option shares were moratorium shares

The defendant raised another ground for contending that the agreement was invalid, and that was because the 3,899,999 MCL shares were, according to the defendant, moratorium shares, although the agreement did not say so. Moratorium shares are particular shares or a particular class of shares made available by a company on the stock market of a stock exchange, which the Securities Commission, under s 11A of the Securities Industry Act 1983, prohibit the trading of from a particular date. A copy of the notice to the stock exchange to impose the prohibition is given by the Commission to the company. By sub-s 6, the stock exchange shall not permit trading in the shares on its stock market in contravention of the notice. That is how the prohibition is given effect to.

The defendant raised the matter in para 10 of his first affidavit in reply, the one dated 11 January 1999 (encl 9), where he simply said, 'Plaintif berpengetahuan bahawa saham-saham yang terlibat merupakan saham-saham 'moratorium' dan tidak boleh diurusniagakan'. The defendant did not furnish any evidence of the imposition of the moratorium or state when the moratorium look effect. But on 11 February 1999 he filed another affidavit (encl 10) to furnish support for his averment that the option shares were moratorium shares. The support was an agreement dated 27 September 1996 for the sale by two members of a company, Gennequity (M) Sdn Bhd, of the entire fully paid up shares in the capital of the company to a company called Rampai Ujong Sdn Bhd ('the Gennequity agreement'). The Gennequity agreement stated that the sole and main assets of the vendor company were MCL shares and that the MCL shares were encumbered by way of moratorium. The particulars of the MCL shares were given as follows in the Third Schedule to the Gennequity agreement:

Name of assets	Certificate	Number of shares	Morartorium
MCL Corporation Bhd	19	1,350,000	11 Nov 1996
MCL Corporation Bhd	20	1,350,000	11 Nov 1997
MCL Corporation Bhd	21	1,350,000	11 Nov 1998
MCL Corporation Bhd	22	1,350,000	11 Nov 1999
MCL Corporation Bhd	23	899,999	11 Nov 2000

It is to be noted that the MCL shares that were the sole assets of Gennequity and that were said to be subject to a moratorium were specific shares under specific share certificates. According to recital D in the Gennequity agreement, the moratorium dates in the Third Schedule were the dates on which the moratorium was imposed. Apparently, at the date of the Gennequity agreement, 27 September 1996, moratorium had already been imposed on the shares under the respective share certificates but to was take effect on a future 11 November of a different year in respect of each share certificate. There is no apparent link between the 3,899,999 MCL shares in this case and the MCL shares which were the assets of Gennequity. The Gennequity agreement therefore does not provide proof, or anything towards proof, that the option shares in this case were subject to a moratorium, let alone the effective date for it. At the most, it merely excites curiosity as to whether the option shares in this case could also have been subject to a moratorium at some time or other. Therefore if in averring that the option shares were subject to a moratorium the defendant only had the Gennequity agreement as the basis for the averment, then the averment was not an averment of fact but a speculative averment.

The plaintiffs, by their affidavit dated 16 March 1999 (encl 11), responded in two ways. Firstly, they averred that the shares were not moratorium shares, saying, 'The defendant knows this' (para 8) and that the defendant had not proven his allegation (para 7). Secondly, as regards

A the Gennequity agreement, they maintained, correctly, that it did not relate to the agreement in this case (para 30). The plaintiffs did not support their averment that the shares were not moratorium shares by any positive proof but by the argument that if the shares were moratorium shares the fact would have been endorsed on the share scrips, but it was not (paras 8 and 10), and the sale and transfer of the shares by the plaintiffs would have been B rejected by the relevant authority (para 10), which I take to refer to the stock exchange in view of sub-s 6 of s 11A of the Securities Industry Act 1983.

The defendant replied by his affidavit dated 31 March 1999 (encl 12). In response to the plaintiffs' assertion in para 7 of their encl 11 that the defendant had not proved that the option shares were moratorium shares, C the defendant in para 9 of his encl 12 maintained his reliance on the Gennequity agreement. In response to paras 8 and 10 of the plaintiffs' encl 11, where the plaintiffs maintained that the shares were not moratorium shares, that the defendant knew they were not and that if they were moratorium shares the fact would have been endorsed on the share scrips, the defendant in para 10 of his encl 12 denied that the shares were not D moratorium shares, denied that he knew they were, and argued that as currently share scrips were no longer in use the existence of a moratorium could not be determined from the share scrips. But the defendant did not seem to be relying too much on that argument because he ended para 10. which carried that argument, with the words 'Tetapi apa yang penting dalam kes ini ialah plaintif memang mempunyai pengetahuan bahawa E saham-saham terlibat adalah saham-saham moratorium'. What the defendant was doing was to persist in imputing to the plaintiffs' knowledge of the alleged fact, and in relying on the imputation, in spite of the plaintiffs' denial of the alleged fact and in spite of the plaintiffs' assertion that the defendant knew the contrary.

F There was no reply in the defendant's said affidavit to the plaintiffs' argument that if the shares were moratorium shares the plaintiffs would not have succeeded in selling them.

As to the plaintiffs' contention in their para 30 that the Gennequity agreement was not related to the agreement in this case, the defendant in G para 18 of his said affidavit claimed that the MCL shares in the Gennequity agreement, that is the shares that were the company's sole assets, were the same shares as the shares in this action, that is the option shares, and asked the plaintiffs to prove otherwise. The defendant did not say why he claimed they were the same shares and as I have stated earlier, the plaintiffs, to my mind, were correct when they said that the Gennequity agreement was not H related to the agreement in this case. Without giving a plausible reason for what he asserted, here the defendant was asking the plaintiffs to prove otherwise. He should have first provided some viable reason for his assertion before he was entitled to demand that the plaintiffs prove otherwise. The defendant in that paragraph proceeded further by saying that he was in the process of obtaining other documents and agreements to prove his claim I and that he reserved his right to file a supplementary affidavit to introduce those documents and agreements. That was the last affidavit for the summary judgment application. As I said, there were 20 more days before

the hearing of the application, but the defendant did not furnish the documents and agreements.

In his initial written submission (para 3.4.1) for proof that the option shares were moratoruim shares, the defendant sought to rely on proof by admission from the absence of a reply by the plaintiffs to the defendant's challenge, to which I referred just now, in para 18 of his last affidavit, to prove that the shares in the Gennequity agreement were not in the option shares. But, as I have stated, it was not, in the circumstances, for the plaintiffs to prove it, and the plaintiffs' failure to respond to the challenge, more so as they had been maintaining previously that the option shares were not moratorium shares, cannot therefore be taken to be an admission of the defendant's claim.

If the question whether the option shares were moratorium shares was to be considered in the light of the argument by the affidavit, as opposed to factual proof, I would not be prepared to accept the plaintiffs' argument that since the share certificates were not endorsed with the moratorium, the shares are not moratorium shares. It has not been shown how the endorsement would have been effected if, when a moratorium is imposed, the relevant share certificates are in the possession of their owner and not in the possession of the authority that would be placing the endorsement. According to law, a moratorium is imposed by a notification of the Securities Commission to the stock exchange who would then be bound by law not to permit trading in the shares. It is not necessary, in order to ensure that the moratorium is observed, that the share certificates be endorsed. But the plaintiffs' argument that if the shares were moratorium shares they would not have been able to effectively sell them has not been replied to by affidavit, so that, going by affidavit, the argument, which seems logical, prevails.

If the question were to be considered in the light of factual proof by affidavit, the position is that the defendant, who raised the question and who must therefore support his averment, has not furnished any evidence that can reasonably be said to provide a reason for a need to determine the question in a trial. At the most, as I have said, what the defendant has done by exhibiting the Gennequity agreement is to excite curiosity as to whether the option shares might also be moratorium shares. But merely to excite curiosity is not sufficient to claim that there is a triable issue as to the point in question. This is not a question that is to be decided on an assessment of the credibility of interested witnesses who assert and deny a fact. It is a question that is capable of being decided by independent evidence. The best evidence would be that of the Securities Commission, the authority that imposes a moratorium, or that of the stock exchange, or that of the company itself, who would have been notified of the imposition of a moratorium if it had been imposed on the option shares. But the defendant presumably did not make enquiries from those sources, or, if he did, his enquiries had not produced any result in his favour. I have to conclude that in asserting, for resisting summary judgment, that the option shares were moratorium shares, the defendant had only the Gennequity agreement to rely on. He did not even produce the other documents and agreements that he mentioned.

If the question were to go for trial, I do not see how he could do any better. It might be suggested that if the question was to go for trial, the defendant would be able to call witnesses from the Securities Commission, the stock exchange or the company to prove that the shares were moratorium shares. But at this stage there is no basis for supposing that there is a likelihood of that happening. The defendant must lay the basis for it now, otherwise the suggestion will be seen merely as a device to delay judgment. He will only be making a bare assertion at the summary judgment stage and claiming that he can prove it at the trial. If that can be done, an application for summary judgment can rarely succeed.

What if the shares were moratorium shares?

The defendant's stand is that if the option shares were moratorium shares, the agreement in this case was void by virtue of s 57(1) of the Contracts Act 1950 for being 'an agreement to do an act impossible in itself', the argument being that the existence of the moratorium rendered it impossible for him to purchase the shares at the time at which he was bound under the agreement to do so. For the reasons that I have given, in my judgment the defendant failed to raise an issue to be tried whether the shares were moratorium shares. The application of s 57(1) of the Contracts Act 1950 would require evidence of the exact date of the imposition of the moratorium and the exact date, if any, of the cessation of the moratorium. From the affidavits it appears that the defendant did not know as a matter of fact that the option shares were moratorium shares, let alone the dates of the imposition and cessation of the moratorium. In fact there is no evidence that the defendant's failure to purchase the shares was due to his knowledge at the time that the shares were moratorium shares. It appears to me that the question of the moratorium was a question that arose in the defendant's mind only after he defaulted and solely as a matter of conjecture prompted by the Gennequity agreement.

Another point raised in submission by the defendant concerning the alleged moratorium is that because of the moratorium the plaintiffs' sale of the shares after the defendant's default was an illegal transaction which the court is not bound to recognize. I do not think there is any merit in the argument. The sale by the plaintiffs was to get in money from the shares after failing to get the amount that the defendant was bound to pay for them, so that the plaintiffs needed to sue the defendant only for the difference. If the shares were moratorium shares, the effect of s 11A(6) of the Securities Industry Act 1983 would be a problem solely between the plaintiffs and the buyer. As it is, the plaintiffs are content to rest on the fact that they received RM16,797,228.02 from the sale of the shares, as if there had been no problem with the sale, and to set off that amount against the strike price, claiming the difference from the defendant. I do not see why, were the shares moratorium shares, the court should not because of s 11A(6), recognize the sale proceeds. The effect of the section is not to my mind so far-reaching.

The sale of the shares

This is an appropriate juncture to deal with various points raised by the defendant concerning the plaintiffs' sale of the shares.

As has been seen, the defendant failed to purchase the option shares by 27 January 1998. In para 12 of the statement of claim, the plaintiffs aver that pursuant to cl 10(b) of the agreement, they disposed of the 3,899,999 option shares for RM16,797,228.02 in two transactions. The first was on 9 February 1998, when 2,818,000 shares were sold for RM13,886,056.21. The second was on 9 March 1998, a month later, when 1,081,999 shares were sold for RM2,911,171.81. In giving on 16 December 1998 further and better particulars relating to para 12 of the statement of claim, the plaintiffs had stated, in reply to the question to whom the shares were sold, that to their knowledge they had been sold in the open market (meaning, I think, that therefore they did not know who the buyers were) and, in reply to the question where the contract notes were, that to their knowledge the contract notes had been issued by Arab-Malaysian Securities Sdn Bhd and Libra Asia Securities Ltd. The plaintiffs filed their application for summary judgment on 30 December 1998. To their affidavit in support of the application they exhibited the two contract notes. One was issued by Arab-Malaysian Securities Sdn Bhd in respect of the sale of 2,818,000 shares on 9 February 1998, which was at RM4.96 per share. The other was issued by Libra Asia Securities Ltd, a Hong Kong company, in respect of the sale of 1,081,999 shares on 9 March 1998, which was at RM2.70 per share.

In para 11.2 of his affidavit dated 11 January 1999 (encl 9) the defendant complained of the delay in selling the shares. He said in para 17 of his affidavit dated 3 March 1999 (encl 12) that the plaintiffs were duty-bound to mitigate their losses, meaning that the plaintiffs should have obtained greater returns from the shares by selling them when the prices were better. He said, as an example, that if the plaintiffs had sold all the shares on 9 February 1998 at RM4.96 per share, his losses would have been reduced by at least RM24m. He also said that the reason that the plaintiffs had given for the delay in selling the shares was not probable and was a bare statement.

I think that the example that the defendant gave was not just an example but was his real complaint. He could not have been complaining about the sale at RM4.96 on 9 February 1998 because he did not show or allege that a sale before that date would have fetched a higher price. His real complaint was about the sale of 1,081,999 shares one month later at RM2.76, which he said would have been at RM4.96 had it also taken place on 9 February 1998.

The explanation that the plaintiffs had given was in para 26 of their affidavit dated 16 March 1999 (encl 11), and it was this: 'Since there are 3,899,999 MCL shares to sell, it was not practical to sell them individually or in small quantities. Instead the plaintiffs found purchasers who were willing to purchase all the MCL shares in two transactions'. I understand that to mean that since it was such a large amount of shares, the practical course was to sell them all at one go to one buyer, if possible, and not to sell

them bit by bit to different buyers, but in the event, because there was such a large number of shares, there was no one buyer who was able to buy all the shares and the plaintiffs were only able to do the next best thing, that is, sell to two buyers at different times. I do not find the explanation at all improbable. It is not probable that the plaintiffs would not have sold all the shares on 9 February 1998 if they could have done it. After all, it was also in their interest to get the highest returns for the shares so as to have to sue for a smaller amount of shortfall.

The plaintiffs also relied on cl 10(b) of the agreement. I shall quote cl 10 in its entirety:

> In the event of the default of the Grantee in purchasing the Option Shares or in completing the purchase upon the exercise of the option hereby granted by the Grantor, the Grantor shall be entitled to:
>
> (a) specific performance and/or damages ensuing from the default of the Grantee; or
>
> (b) dispose of the Option Shares to any third party or parties at such prices and upon such terms and conditions as the Grantor may deem fit and recover the difference between the Strike Price and amount so realized on the disposal of the Option Shares from the Grantee.

There is obviously an error in several places in the clause in the identification of the parties, resulting in 'Grantee' being stated instead of 'Grantor' and vice versa. The part of the clause that the plaintiffs relied on is that part that, when correctly read, provides that in the event of default of the defendant in purchasing the option shares, the plaintiffs 'shall be entitled to ... dispose of the option shares to any third party or parties at such prices and upon such terms and conditions that the [plaintiffs] may deem fit'. It is a wide power to dispose of the shares to any third party. The price is left to the discretion of the plaintiffs. The clause does not oblige the plaintiffs to sell at the best price. Such a requirement would not be practical because in the matter of sale of shares what is the best price would always be controversial. A person may sell today thinking that today's price is the best but the price goes up after the sale and he gets blamed or he blames himself for selling today. On the other hand, he may not sell today, hoping that the price would increase, but it keeps going down, and he gets blamed, or he blames himself, for not selling today.

In para 11.3 of his affidavit at encl 9 the defendant said that the sale in Hong Kong on 9 March 1998 through Libra Asia could not have been done and could not be true because Libra Asia was not a member of the Kuala Lumpur Stock Exchange and the option shares were not listed on the Stock Exchange in Hong Kong. The implication of the assertion is that the relevant credit note exhibited by the plaintiffs is not genuine, which I am completely unable to accept.

In para 11.4 of the same affidavit the defendant gave another reason for contending that the sale in Hong Kong was not true. It is the fact, set out earlier, that the plaintiffs, when applying for summary judgment, was able to exhibit the contract note whereas earlier, when asked to state where the

contract note was, the plaintiffs had not stated where it was but had stated instead that it had been issued by Libra Asia. I do not think that the failure on the plaintiffs' part to give a direct reply, whatever the reason for it may have been, meant that the contract note was not then in existence and that it was brought into being only for the purpose of the summary judgment application. Neither do I think that the circumstances concerning the disclosure of the Libra Asia contract note constitute, as the defendant argued in para 11.4 of encl 9, the improving of his pleading by affidavit.

The defendant argues in his written submission that the sale involving Libra Asia was not a sale on the open market as the plaintiffs had asserted in giving further and better particulars. One reason given by the defendant for saying that the sale was not on the open market is because the Libra Asia contract note bears an indication that the transaction was completed by Libra Asia as a principal. The defendant, however, has not raised this question in his affidavit and the plaintiffs have not, therefore, had an opportunity to explain, in relation to the sale involving Libra Asia, what they meant by saying that the sale was on the open market. This argument ought not, therefore, be entertained.

There is, to my mind, no triable issue as to the truth or genuineness of the sale involving Libra Asia.

The defendant also attacked the sale on the ground of illegality This he did in para 5 of his affidavit dated 11 February 1999 (encl 10). The argument about illegality is set out in his written submission. The defendant relies on two statutory provisions. One of them is s 7 of the Securities Industry Act 1983 which provides, inter alia, that 'A person shall not ... maintain, or assist in ... maintaining ... a stock market that is not a stock market of a stock exchange ...'. The defendant argues that by selling the shares through Libra Asia, a Hong Kong company, the plaintiffs were maintaining or assisting in maintaining a stock market that is not a stock market of the Kuala Lumpur Stock Exchange, in contravention of s 7. The implication of the argument is that by selling the shares through Libra Asia the plaintiffs were maintaining, or assisting in maintaining, some stock market, probably in Hong Kong. I need to state only one reason why the argument cannot succeed. A person who sells his shares can never be said to be maintaining, or assisting in maintaining, any stock market within the meaning of s 7. The act of maintaining intended by s 7 refers to a person who has a part in running or in ensuring the continued existence of a stock market. He is part of the organization that runs or controls the stock market.

The other provision is s 12 of the same Act which provides, as far as material, as follows:

> A person shall not carry on a business of dealing in securities ... unless he is the holder of a dealer's licence under this Part.

The definition of 'dealing in securities' in s 2(1) includes 'acquiring... securities'. It is argued that by acquiring the MCL shares in this case from the plaintiffs Libra Asia was dealing in securities and that since they did not have a dealer's licence under the Act, they were in breach of the Act with

A the assistance of the plaintiffs who theretore participated in an illegal transaction. The argument cannot stand because even if Libra Asia did acquire the shares and therefore were dealing in securities, the prohibition of s 12 is not on dealing in securities but on carrying on a business of dealing in securities and even if Libra Asia were carrying on such a business, they were doing so in Hong Kong and did not require a dealer's licence under
B the Act. The Act does not control the business of dealing in securities in Hong Kong.

There is therefore no triable issue as to the legality of the sale of the shares involving Libra Asia.

C *Service of the demand notice*

The last point that I shall deal with is the question of service on the defendant of the demand notice dated 20 January 1998 under cl 4 of the agreement. The defendant denied receiving the notice. The copy of the notice exhibited by the plaintiffs shows that the notice was addressed to the
D defendant at his address given in the agreement and in his affidavits and that it was sent by registered post. The plaintiffs' director, in his affidavit dated 16 March 1999 (encl 11), in paras 12 and 13 averred that the notice was sent to the defendant at that address and exhibited, as from the plaintiffs' record of registered letters sent, a slip from the post office dated 23 January 1998 acknowledging receipt of a registered item addressed to Low Kon
E Yang, which is the name of the defendant, but the address is not given in the slip.

Clause 12 of the agreement provides for the giving of notices by registered post besides other means and says that if a notice is sent by registered post it 'shall be deemed to have been given two (2) days after
F posting'.

The defendant argues in his written submission that for the presumption of receipt of the notice to arise there must be conclusive proof of posting. The defendant argues that there is no such proof in this case because the postal slip is dated three days after the date of the notice, the postal slip does not indicate that the thing posted was addressed to the
G defendant's address and there is no proof that what was delivered to the post office to be sent by registered post on 23 January 1998 was the notice dated 20 January 1998. The defendant further argues that the affidavit evidence of the plaintiffs' director is hearsay evidence and ought not to be admitted because it is not the evidence of a person who actually knew that it was the
H notice that was posted but who only received information that it was so but has not revealed the source of the information.

I am satisfied that the postal slip proves that an envelope addressed to the defendant was delivered to the post office on 23 January 1998 for delivery by registered post. I reject any possibility that the address on the envelope was not the defendant's correct address. I also reject the possibility
I that the envelope did not contain any letter or that it contained a letter other than the notice to the defendant dated 20 January 1998. No circumstance exists for entertaining such a possibility. The difference in dating between

the postal slip and the letter merely indicates that the letter was posted three days after it was typed. The director may not have been the person who actually placed the letter in the envelope and took the envelope to the post office. He was likely to be testifying from office records, which is not really giving evidence from information for which disclosure of the source is required. But the fact is that the office records do prove that a postal packet to the defendant was received by the post office on 23 January 1998 for delivery by registered post. If the possibility of wrong addressing is excluded, the defendant must have received the packet. It must contain the notice, otherwise he would have said, yes, he did receive a registered packet but it contained no letter or some other letter.

As the defendant has failed to raise a triable issue I dismiss with costs the defendant's appeal against summary judgment, but, for the reason that I have given, I reduce the judgment amount to RM25,626,637.52.

Appeals dismissed.

Reported by Sivapragasam Kumaran.